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IN THE

# Supreme Court of the United States

**October Term, 1959**

**No. 275**

In the Matter of LOCAL 824, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (Ind.),

*Petitioner,*

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

*Respondent.*

---

In the Matter of JOHN BOWERS,

*Petitioner,*

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

This Reply Brief is submitted in opposition to the brief submitted by Respondent to this Honorable Court.

In its brief in opposition, the respondent relies upon four points:

1. The controversy has become moot;

2. That petitioners have failed to obtain a judgment by the highest Court of the State of New York;

3. That the judgment of the Court of Appeals rests upon independent non-constitutional grounds; and

4. That there is no merit to the multiplicity of objections asserted by the petitioners as to the constitutionality of *Section 8* of the *Waterfront Commission Act.*

With respect to respondent's *first point*, that the controversy has become moot, it is strongly contended that the controversy has not become moot. With respect to that point, respondents strongly rely upon the case of *St. Pierre* v. *U. S.*, 319 U. S. 41. However, the respondent has failed to state to this Honorable Court that a petition for a writ of certiorari was granted in that case by this Honorable Court. It should be noted that, in that case, this Honorable Court emphasized the fact that the defendant neither applied for bail or for a stay.

In the case at bar, a motion was first made in the Supreme Court of the State of New York to quash, vacate and set aside the subpoenaes served upon the petitioners, which motion was denied. A Notice of Appeal was then filed in the Appellate Division of the Supreme Court, First Department, and a motion was made for a stay of such subpoenaes by the petitioners, which motion was granted. The Appellate Division of the Supreme Court, First Department, affirmed the order of the Supreme Court of the State of New York. A Notice of Appeal was then served as a matter of right to the Court of Appeals of the State of New York, pursuant to *Section* 588, subdivision 1(a) of the Civil Practice Act, contending that there was directly involved

the construction of the Constitutions of the State of New York and of the United States.

An application was then made to Judge Fuld, of the Court of Appeals of the State of New York, for a further stay of the subpoenaes served upon the petitioners, which application was denied by Judge Fuld; so that, whenever and wherever possible, motions were made for a stay of the subpoenaes issued by the respondent and served upon the petitioners.

In addition thereto, it is urged that the case of *U. S. v. Rock Royal Co-Op*, 307 U. S. 533, establishes beyond any contention that the matter at bar has not become moot. In that case, the Secretary of Agriculture, after holding public hearings pursuant to the *Agricultural Marketing Agreement Act of 1937*, issued an order which was subsequently suspended since a lower Court decree affected its administration and enforcement. Yet this Court, at page 555 in that case, stated as follows:

> "Since this suspension is authorized by the statute and the Order preserves accrued rights, we are of the opinion this step does not make these proceedings moot. Reports of their receipts and classified sales of milk, accounting of their pool obligations in the determination of the uniform price and settlement with their producers on the basis of this Order, as well as the payment of money, are sought from the defendants. The controversy over the validity of the Order and the power to enforce its provisions remains."

Also, in the case of *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 499, a motion was made by the respondent to dismiss the appeal for being moot, on the ground that the ruling, which was the subject

of the proceedings, was no longer in effect. There, this Honorable Court, at page 515, stated as follows:

> "In the case at bar, the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, *capable of repetition, yet evading review*, and at one time the Government and at another time, the carriers have their rights determined by the Commission without a chance of redress." (Italics mine)

In the case at bar, while we are not dealing with the Secretary of Agriculture or with the Interstate Commerce Commission, we are dealing with the Waterfront Commission of New York Harbor, which has control over the entire waterfront of the States of New York and New Jersey. No one may work on this waterfront unless he is registered by the Waterfront Commission of New York Harbor, and given a license to work. The influence of the respondent is as great as the influence of the Secretary of Agriculture or the Interstate Commerce Commission.

This Court must be cognizant of the fact that the economy of our country depends upon the flow of imports and exports to and from our country, in the largest port of our country, the Port of New York—and that over that Port, the respondent has jurisdiction.

As has been pointed out in the brief submitted by petitioners for a writ of certiorari, the power of subpoena on the part of the respondent is still prevalent.

Just as has been stated in the case of *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission* (*supra*), while the orders of the I.C.C. are usually continuing, the subpoena power of the respondent is surely continuing. Certainly, there cannot be any difference between rates set by the I.C.C. or the Secretary of Agriculture, carrying out the obligations of his office, and the Waterfront Commission of New York Harbor, which has been vested with jurisdiction over the entire Ports of New York and New Jersey by the Legislatures of New York and New Jersey and the Congress of the United States. At least, the respondent contends that it has the power of subpoena and jurisdiction over any labor organization which has anything to do with the waterfront, and has the power to determine who is or who is not to work on the waterfront.

The order of the Secretary of Agriculture may affect the prices of farm products, the orders of the Interstate Commerce Commission may affect the rates of transportation, but, surely, when the largest port in our country is affected by the action of the respondent, it becomes of equal importance to this Honorable Court as the actions of the Secretary of Agriculture or the Interstate Commerce Commission.

Here, it may appear that the effect is local but the repercussions must be felt throughout the entire country. In addition to affecting the economy of our country, thousands upon thousands of people are directly involved in the work engaged in in the Ports of New York and New Jersey.

It is therefore submitted that the controversy has not become moot.

In "*Point II*", respondent argues in its brief that petitioners have failed to obtain a judgment by the highest court of the State, in which a decision could be had, as required by *Section 1257* of *Title 28*.

After the Notice of Appeal to the Court of Appeals of the State of New York was served and filed as a matter of right, pursuant to *Section 588, subdivision 1(a)* of the *Civil Practice Act of the State of New York*, a written Notice of Motion was made by the respondent to dismiss the appeal, upon the grounds that there were no constitutional questions directly involved. This motion, made by the respondent, was denied by the Court of Appeals of the State of New York, the highest Court in the State of New York, with leave to the respondent to renew said motion upon argument. The Court of Appeals, by the denial of said motion made by the respondent, not only agreed to review and determine the case at bar, but also agreed to hear and determine all issues which would be presented to that Court.

The only questions which could be presented to that Court were the questions which involved the constitutionality of *Section 8* of the *Waterfront Commission Act*. As has been pointed out in the brief submitted with the petition for a writ of certiorari, *Section 8* is directly involved.

After argument, Judge Fuld, of the Court of Appeals, asked counsel for the respondent whether he renewed his motion to dismiss this appeal for lack of a direct constitutional question being involved. Mr. Sirignano, counsel to the Waterfront Commission of New York Harbor, the respondent herein, then made his motion to dismiss the appeal. By a divided Court, the Court of Appeals of the

State of New York granted the motion. Judge Froessel, in an opinion concurred in by Judge Van Voorhies, dissented.

To apply then for permission to appeal to the Court of Appeals, would be fruitless and useless. The only application which could be made for permission to appeal, would be identical, using the same argument which was made on the appeal itself. The only question then involved—and still involved—is the constitutionality of *Section 8* of the *Waterfront Commission Act*, according to the Constitutions of the State of New York and of the United States. It would have been fruitless, useless and an insult to the Judges of the Court of Appeals of the State of New York to repeat the same, identical arguments on a motion for permission to appeal to that Court. Surely, the Appellate Division of the Supreme Court, First Department, likewise would have considered it a waste of time and an insult to the intelligence of the Judges of that Court.

It appears that the respondent relies, in great measure, upon the case of *McMaster* v. *Gould*, 276 U. S. 284, in support of this point. In that case, a motion to dismiss the appeal was made in the Court of Appeals of the State of New York, and the motion granted. The petitioners in that case then applied to the Appellate Division of the Supreme Court of the State of New York for leave to appeal. This motion was denied. In that case, however, no motion was made to the Court of Appeals of the State of New York, the highest Court of the State of New York, for leave to appeal, so that, in that case, there was merely an order by an intermediate lower court denying permission to appeal. The petitioners in that case elected to petition the Appellate Division of the Supreme Court of the State of New

York for permission to appeal to the Court of Appeals of the State of New York, and did not, upon denial, apply to the Court of Appeals for permission to appeal to that Court.

In the instant case, however, the Court of Appeals of the State of New York had before it all the questions which could be raised with respect to the appeal of the petitioners. There is not one additional, solitary question which could be presented to that Court. Surely, the order of the Court of Appeals of the State of New York, dismissing the appeal, is the final judgment and final order.

On page 286, in the case of *McMaster* v. *Gould* (*supra*), this Honorable Court stated as follows:

> "And since petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the Court of Appeals for such leave, the judgment is not that of the highest Court of the State in which a decision could be had."

As has been pointed out in the case at bar, there is an order by the highest Court of the State of New York dismissing this appeal. As has been pointed out, it would have been fruitless and useless to petition the highest Court of the State of New York for leave to appeal for the reason that the same constitutional questions presented on the argument would have to be presented in a petition for leave to appeal. For that reason, petitioners have elected not to do so. If there were any other question which could be raised, which was not raised in the brief of petitioners to the Court of Appeals of the State of New York, or upon the argument, a motion for leave to appeal to the Court of Appeals would have been made, but the identical questions

presented to this Honorable Court were the questions presented to the Court of Appeals of the State of New York, and there are no additional questions to be presented.

In the case of *Betts* v. *Brady*, 316 U. S. 455, the petitioner applied to the Chief Judge of the Maryland Court of Appeals for a writ of habeas corpus, which was denied. A writ of certiorari was applied for on the ground that the denial was a final judgment. The law of Maryland provides for further applications. This Honorable Court, at page 460, stated as follows:

> "It is true that the order was not final and the petitioner has not exhausted State remedies in the sense that in Maryland . . . a petitioner may apply successively to one judge after another and to one court after another, without exhausting his right. We think this circumstance does not deny to the judgment in a given case the quality of finality requisite to this court's jurisdiction. Although the judgment is final in the sense that it is not subject to review by any other court of the state, we may, in our discretion, refuse the writ, when there is a higher court of the state to which another petition for the relief sought, could be addressed, but this is not such a case."

In the case of *Betts* v. *Brady* (*supra*), this Honorable Court realized the futility of the petitioner going from one judge to another, when the Chief Judge of the Maryland Court of Appeals denied the writ of habeas corpus. Surely, the same principle applies to the instant case. The Court of Appeals of the State of New York, the highest Court in the State of New York, has decreed and ordered that the appeal of the petitioners be dismissed on the grounds that

there were no constitutional questions directly involved. This situation can most favorably be compared to the case of *Betts* v. *Brady*, (*supra*). In that case, this Honorable Court recognized that the Chief Judge of the Maryland Court of Appeals dismissed the writ of habeas corpus and that any future applications would be fruitless and useless.

In the case at bar, the Court of Appeals of the State of New York, the highest Court in the State of New York, has dismissed the appeal of the petitioners for the lack of constitutional questions being directly involved. What difference can there be between the Chief Judge of the Maryland Court of Appeals, sitting for the Court of Appeals of the State of Maryland, and the action by the Court of Appeals of the State of New York in the case at bar?

The respondent contends, in its brief in opposition, to this Honorable Court, that the judgment of the State Courts rests upon independent non-constitutional grounds and that the multiplicity of objections asserted by petitioners to the constitutionality of *Section 8* of the *Waterfront Commission Act* are without merit.

It would serve no purpose to again state the argument set forth in the brief of the petitioners to this Honorable Court, submitted on the petition for a writ of certiorari as to the unconstitutionality of *Section 8*, and the fact that *Section 8* of the *Waterfront Commission Act* is directly involved in this appeal.

In addition to the argument set forth by the petitioners in their brief to this Honorable Court, it is now contended that the new *Federal Labor Act* has pre-empted the entire field governed by *Section 8* of the *Waterfront Commission*

*Act*. The new *Federal Labor Act* is entitled "*Labor-Management-Reporting and Disclosure*" Act of 1959.

It is urged that *Sections 1* and *2* and the definitions contained in *Section 3 of that Act* clearly show that Congress has occupied and federally preempted the area covered by *Section 8* of the *Waterfront Commission Act*.

*Section 504* of this *new Labor Bill* provides, in substance, that no person who has been convicted of, or served any part of a prison term, resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury or a violation of *Title 2 and 3 of the Act*, or conspiracy to commit any such crimes, shall serve as an officer, director or trustee, member of any executive board, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, for five years after such conviction or after the end of such imprisonment.

*That Section* further provides that no labor organization or officer thereof shall knowingly permit any person to assume or to hold any office or paid position, in violation of that section, and any person who wilfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

*Section 8* of the *Waterfront Commission Act* provides that no person shall solicit, collect or receive any dues, assessments, fines or contributions from employees registered or licensed pursuant to the provisions of the Act, for or on behalf of any labor organization representing any such em-

ployees, if any officer, or agent of such organization had been convicted by a Court of the United States, or any State or Territory thereof, of a felony, unless he has been subsequently pardoned therefor by the Government or other appropriate authority of the State or jurisdiction in which such conviction was had, or has received a Certificate of good conduct from the Board of Parole, pursuant to the provisions of the *Executive Law*, to remove the disability.

The evils of that Section intended to be dealt with by the States of New York and New Jersey have now been dealt with by the Congress of the United States, and that field has been fully and completely occupied and pre-empted by the Federal Government.

The *new Labor Law, Section 504(a) and (b)*, makes it a crime for a felon to become an officer, director, trustee, member of any executive board, business agent, manager, organizer or other employee, as heretofore stated, of any labor organization, for a period of five years after such conviction or after the end of such imprisonment. In addition thereto, it makes it a crime for any officer of any labor organization to knowingly permit any person to assume or to hold any office or particular position in violation of this section. That is precisely what *Section 8* intended to deal with. *Section 8* of the *Waterfront Commission Act* places the criminal responsibility on the man who collects dues on behalf of the labor organization, and not on the felon. Besides, the Federal Government having pre-empted this entire field, it would appear that *Section 8* of the *Waterfront Commission Act* is diametrically opposite and opposed to the *new Labor Act*.

In that instance, the Federal law must be solely recognized and the State law must give way to the Federal Law. In addition thereto, *Section 8* of the *Waterfront Commission Act* does not provide that a person collecting dues must have knowledge that any officer of the labor organization had been convicted of any felony, in any Court, in any State or in any Territory of the United States, of a felony, but the *new Labor Act, Section 504*, provides clearly that no labor organization, or officer thereof, shall knowingly permit any person to assume or to hold any office or particular position in violation of this subsection.

It has been contended by the petitioners, in their brief to this Honorable Court, accompanying the petition for a Writ of Certiorari, that the absence of knowledge, in *Section 8* of the *Waterfront Commission Act*, is a denial of due process. The Congress of the United States has recognized the fact that knowledge is required in order to satisfy due process. The Congress of the United States has inserted "knowledge" in *Section 504* of the *new Labor Act*, while *Section 8* of the *Waterfront Commission Act* does not contain the word "knowledge".

## CONCLUSION

**It is respectfully submitted that the petition for a writ of certiorari should be granted.**

Respectfully submitted,

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